

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DAVID P. VANDAMENT,

Petitioner,

v.

SCOTT RUSSELL,

Respondent.

CASE NO. C14-5182 BHS

ORDER ADOPTING REPORT  
AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 14), and Petitioner David Vandament’s objections to the R&R (Dkt. 15).

On June 25, 2014, Judge Creatura issued the R&R recommending that the Court dismiss Vandament’s petition as time barred because it is untimely and Vandament is not entitled to equitable tolling. Dkt. 14. On July 11, 2014, Vandament filed objections. Dkt. 15. On July 21, 2014, the Government responded. Dkt. 16.

The district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to. The district judge may accept, reject, or

1 modify the recommended disposition; receive further evidence; or return the matter to the  
2 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

3 In this case, Vandament argues that his petition is timely and, in the alternative, he  
4 is entitled to equitable tolling. With regard to the majority of Vandament's claims, Judge  
5 Creatura's math is correct and Vandament's petition is untimely. Vandament, however,  
6 argues in his reply (Dkt. 13) and in his objections (Dkt. 15) that the factual predicate for  
7 his fourth ground for relief was not discovered until the state filed its responsive brief to  
8 Vandament's first personal restraint petition on March 8, 2010. Even if the Court agrees  
9 with Vandament and gives Vandament the benefit of the last state decision issued on that  
10 petition, the one-year period began to run on June 12, 2011 and would have expired one  
11 year later on June 12, 2012. Vandament's fourth ground for relief is still untimely  
12 because he failed to file the petition before June 12, 2012. Vandament's second and third  
13 personal restraint petitions do not toll the one-year period because the state court ruled  
14 that they were untimely and "[w]hen a postconviction petition is untimely under state  
15 law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." *Pace v. DiGuglielmo*,  
16 544 U.S. 408, 414 (2005). Therefore, the Court adopts the R&R on the issue of whether  
17 Vandament's petition is untimely.

18 With regard to equitable tolling, Vandament has failed to show that it was  
19 impossible to timely file his federal petition. Vandament's subjective belief that his  
20 second and third personal restraint petitions tolled the limitations period are not  
21 extraordinary circumstances that create impossibility. Therefore, the Court adopts the  
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1 R&R on this issue of equitable tolling and concludes that Vandament's petition is time  
2 barred.

3 With regard to the issue of injunctive relief, Vandament has failed to show that he  
4 has any right to be housed at a particular facility. Therefore, the Court adopts the R&R  
5 on this issue as well.

6 The Court having considered the R&R, Vandament's objections, and the  
7 remaining record, does hereby find and order as follows:

- 8 (1) The R&R is **ADOPTED**;
- 9 (2) Vandament's petition is **DISMISSED** as time barred;
- 10 (3) The Court declines to issue a Certificate of Appealability; and
- 11 (4) This action is **DISMISSED**.

12 Dated this 14th day of August, 2014.

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14 BENJAMIN H. SETTLE  
15 United States District Judge  
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